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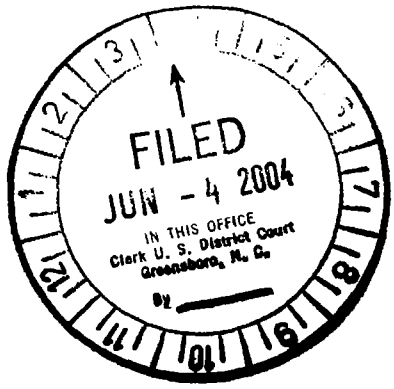
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



LISA MCLENDON ARBIA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	1:02CV00111
	)	
OWENS-ILLINOIS, INC., DAVID LEINEWEBER, EUGENE ESCOLAS, TIMOTHY STEBBINS, AND JACK SHANK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Lisa M. Arbia brings this action against Owens-Illinois, Inc. ("Owens-Illinois"), David Leineweber, Eugene Escolas, Timothy Stebbins, and Jack Shank. Plaintiff originally claimed violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("ADA"), the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq. ("FMLA"), and the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA"). Plaintiff also asserted common law claims of hostile work environment, wrongful discharge, and slander.

On June 4, 2003, this court denied Defendants' motion to dismiss Plaintiff's slander claims against Leineweber, Escolas,

Stebbins, and Shank, but granted the motion to dismiss as to all of Plaintiff's remaining claims against those individual defendants. The court also granted Defendants' motion to dismiss Plaintiff's Title VII, ADA, and hostile work environment claims against Owens-Illinois. Remaining are Plaintiff's FMLA, FLSA, and wrongful discharge claims against Owens-Illinois, and her slander claims against all defendants. Owens-Illinois and the collective individual defendants have separately moved for summary judgment on all of Plaintiff's claims. This matter is now before the court on both motions for summary judgment and Plaintiff's motion to modify an order of this court, dated August 14, 2003.[1]

I. STANDARD OF REVIEW

Summary judgment is appropriate when an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). The court must view the facts in the light most favorable to the nonmovant, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986), and summary judgment should be granted

[1] The order of August 14, 2003, denied Plaintiff's motion to reconsider the dismissal of her Title VII and ADA claims.

unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented. McLean v. Patten Communities, Inc., 332 F.3d 714, 719 (4th Cir. 2003) (citing Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2509-10).

II. ANALYSIS

A. Owens-Illinois' Motion for Summary Judgment

All of Plaintiff's claims arise out of her employment with Owens-Illinois, which commenced in 1998. On February 1, 2001, Owens-Illinois supervisors met with Plaintiff and advised her that she had the option to resign or be fired immediately.[2] In exchange for her resignation, the Owens-Illinois supervisors offered Plaintiff a "neutral job reference" and a severance payment of $17,840.52, which represented six months of Plaintiff's salary. (Pl.'s Dep. at 179, 184-85; Escolas Aff. Attach. U.) Plaintiff was also told that she would have to sign a release relinquishing her right to "sue, bring any actions, liabilities, claims . . . or lawsuits . . . relating to her employment by Owens-Illinois." (Escolas Aff. Attach. U.) Plaintiff elected to resign, signed the release, and accepted the severance payment. (Pl.'s Dep. at 184-85.)

[2] Plaintiff asserts that Owens-Illinois decided to end her employment in retaliation for taking FMLA leave in October and November 1999. Owens-Illinois contends that its actions resulted from Plaintiff's repeated tardiness (including six incidents the month before she resigned), absenteeism, and poor work performance.

Defendants contend the release is valid and constitutes a complete defense to this action. (Owens-Ill.'s Mem. Supp. Mot. Summ. J. at 10-11.)[3] Because the release in question has been admitted as evidence and Plaintiff does not dispute that it was based on valuable consideration and that it was executed, see Pl.'s Dep. at 184-85, it is her burden to demonstrate that the agreement is void. Ward v. Heath, 222 N.C. 470, 472, 24 S.E.2d 5, 7 (1943); Aderholt v. Seaboard Air Line R.R., 152 N.C. 411, 412, 67 S.E. 978, 979 (1910).

Under North Carolina law, a release obtained by fraud or other coercive circumstances may be voidable. See, e.g., Link v. Link, 278 N.C. 181, 195-96, 179 S.E.2d 697, 706 (1971). In this case, Plaintiff argues that the release is not binding because she signed it under duress. (Pl.'s Dep. at 186-87.) Plaintiff asserts that she requested an attorney to review the release, but was told that the resignation offer would be rescinded if she did not accept it on the spot. (Id. at 187.) Plaintiff further states that she was forced to sign the release and resign because

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[3] In future filings, Owens-Illinois' defense counsel are admonished to comply with this court's Local Rules, which provide that principal briefs are to be limited to 20 pages. See LR7.3(d), 56.1(c). Owens-Illinois' Memorandum in Support of Motion for Summary Judgment spans 40 pages, grossly exceeding the limit imposed by this court. Defense counsel did not seek permission to file an extended memorandum and, as such, the court declined to review the final 20 pages. Defense counsel will undoubtedly be relieved to discover that their argument regarding Plaintiff's signed release appeared on pages 10 and 11, and, as such, was considered by the court.

she believed immediate termination would result in the loss of her health insurance. (Id. at 179, 181, 187.)

Assuming, as Plaintiff contends, that these circumstances constituted duress, the release in question is voidable. Nevertheless, even a voidable release may be rendered binding if Plaintiff, with full knowledge of its contents and the surrounding circumstances, ratified the agreement by her conduct.

> A release, originally invalid or voidable, for any reason may be ratified and affirmed by the subsequent acts of the persons interested. Thus if one, who has been induced by fraud and misrepresentation to execute a release and subsequently learns the true import thereof, knowingly takes the benefits of it, he thereby ratifies and gives it force and effect. If the plaintiff knew the facts and circumstances of the execution of the release and knew its provisions, and then accepted its benefits he is thereby estopped to deny its validity.

Presnell v. Liner, 218 N.C. 152, 154, 10 S.E.2d 639, 640 (1940); see Jordan Motor Lines v. McIntyre, 157 F. Supp. 475, 477 (M.D.N.C. 1957) (stating that plaintiff was estopped from alleging fraud to rescind a release when he retained payment for more than two years before instituting lawsuit); Link, 278 N.C. at 197, 179 S.E.2d at 706 ("It is elementary that a transaction procured by either fraud, duress or undue influence may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside."); Davis v. Hargett, 244 N.C. 157, 163, 92 S.E.2d 782, 786 (1956) (holding that the plaintiff was bound to

terms of release alleged to have been signed under duress since he retained benefits even after duress was removed).

Plaintiff knowingly accepted the benefits of the release agreement; she took the severance payment of $17,840.52 and stated in her deposition testimony on January 23, 2004, that she had never attempted to return it. (Pl.'s Dep. at 185.) Having kept the payment for nearly three years, Plaintiff is now estopped from arguing that she is not bound by the terms of her release. See Davis, 244 N.C. at 163, 92 S.E.2d at 786; Presnell, 218 N.C. at 154, 10 S.E.2d at 640. Further, Plaintiff understood the provisions of the release and was fully aware of the circumstances which she now alleges constituted duress. See Presnell, 218 N.C. at 154, 10 S.E.2d at 640. By accepting and retaining the valuable consideration offered in exchange for the release even after the alleged duress was removed, Plaintiff ratified the agreement, rendering it valid and binding. See Davis, 244 N.C. at 163, 92 S.E.2d at 786.

Since Plaintiff ratified the release, the court need not consider whether the circumstances of its signing constituted duress. Even if the release were voidable due to duress, Plaintiff's retention of the severance payment for over three years renders the agreement binding. Since all of Plaintiff's claims against Owens-Illinois relate to her employment, her resignation, or events that occurred in the course of her

employment, Plaintiff is contractually barred from pursuing this lawsuit. For this reason, the court will grant Owens-Illinois' motion for summary judgment as to all of Plaintiff's claims.

B. Defendants Leineweber, Escolas, Stebbins, and Shank's Motion for Summary Judgment

Plaintiff's only remaining cause of action is a common law claim of slander asserted against the individual defendants. Slander is "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." Morrow v. Kings Dep't Stores, Inc., 57 N.C. App. 13, 20, 290 S.E.2d 732, 736 (1982). As such, a plaintiff alleging slander must demonstrate that the party charged published a defamatory statement about the plaintiff to a third party. Id.

When asked repeatedly whether any of the individual defendants made any statements about her that she alleged to be slanderous, Plaintiff consistently responded that they had not. (Pl.'s Dep. at 8-13, 28-29.)[4] Rather, Plaintiff contended that each individual defendant "furthered [the] remarks by doing nothing about it." (Id. at 28-29.) By this allegation, Plaintiff appears to assert that her supervisors are vicariously

[4] Plaintiff has never asserted in any filing that the individual defendants themselves slandered her. (See, e.g., Compl. at 2; Pl.'s Br. Opp'n Mot. Dismiss at 3-4; Pl.'s Resp. Defs.' Reply at 4; Am. Compl. at 7; Pl.'s Resp. Defs.' Answer at 4; Pl.'s Mem. Opp'n Mot. Summ. J. at 8.)

liable for the slander of other employees. However, respondeat superior theories of liability fail if the employee who committed the alleged tort acted outside the scope of her employment. See Troxler v. Charter Mandala Ctr., Inc., 89 N.C. App. 268, 271-72, 365 S.E.2d 665, 667-68 (1988) (holding that employee alleging a supervisor's statements were made with malicious intent was precluded from asserting conflicting argument that statements were also made in furtherance of the employer's business). Respondeat superior is inapplicable to Plaintiff's claim since her co-workers could not have slandered her with malicious intent, see Pl.'s Dep. at 8, and simultaneously have been acting to further the purposes of their employer. Since the individual defendants cannot be held liable for the defamatory comments under respondeat superior and did not themselves communicate such statements, Plaintiff cannot pursue a slander claim against them.

Plaintiff's claim also fails because she has not produced any evidence of the necessary elements of a slander cause of action. North Carolina recognizes two types of slander, slander per se and slander per quod. Morrow, 57 N.C. App. at 20, 290 S.E.2d at 736. A claim of slander per se contemplates only certain statements: "(1) accusations that the plaintiff committed a crime involving moral turpitude; (2) allegations that impeach the plaintiff in his or her trade, business, or profession, and (3) imputations that the plaintiff has a

loathsome disease." Morris v. Bruney, 78 N.C. App. 668, 675, 338 S.E.2d 561, 566 (1986) (citing Tallent v. Blake, 57 N.C. App. 249, 253, 291 S.E.2d 336, 339 (1982)).

The entirety of Plaintiff's slander claim rests on her allegation that two of her co-workers, Jane Byrd and Tina Revels, spread rumors that Plaintiff slept with various co-workers, made excuses to miss work, and faked illness. (See Pl.'s Dep. at 13-14, 16-17, 19, 20-22, 24-25.) Since these statements do not imply that Plaintiff committed a crime or has a loathsome disease, they must affect Plaintiff's profession in order to constitute slander per se. Although the remarks do relate to Plaintiff's job, they do not, as a matter of law, rise to the level of slander per se. See, e.g., Morris, 78 N.C. App. at 677, 338 S.E.2d at 567 ("'Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business.'" (quoting Badame v. Lampke, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955))); Tallent, 57 N.C. App. at 253, 291 S.E.2d at 339-40 (concluding that statements portraying the plaintiff as dishonest and an unreliable employee were not actionable as slander per se). Consequently, Plaintiff's slander claim will only survive if she has successfully demonstrated proof of slander per quod.

A slander per quod claim requires proof of special damages. Badame, 242 N.C. at 756-57, 89 S.E.2d at 467-68. When asked

repeatedly whether she had suffered any monetary loss due to the slander, Plaintiff unequivocally responded that she had suffered humiliation and embarrassment, but no money damages. (Pl.'s Dep. at 39-40, 44.) This allegation does not demonstrate special damages as recognized by North Carolina law, which requires actual pecuniary loss. Tallent, 57 N.C. App. at 254, 291 S.E.2d at 340 (1982) ("Emotional distress and humiliation alone are not enough to support a claim actionable per quod."); Williams v. Rutherford Freight Lines, Inc., 10 N.C. App. 384, 387, 179 S.E.2d 319, 322 (1971) ("Special damage, as that term is used in the law of defamation means pecuniary loss, as distinguished from humiliation." (citing Penner v. Elliott, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945))). Since she has not alleged or demonstrated evidence of special damages, Plaintiff has failed as a matter of law to establish a claim of slander per quod.

The circumstances alleged do not constitute slander per se and Plaintiff has failed to plead or allege special damages, a required element of slander per quod.[5] Accordingly, she has

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[5] Plaintiff's slander claim may also be time barred, since the most recent of the slanderous comments was spoken in the summer of 2000, Pl.'s Dep. at 16, more than one year from the filing of Plaintiff's complaint. See N.C. Gen. Stat. § 1-54(3) (stating that the statute of limitations for slander claims in North Carolina is one year). In her response to Defendants' motions for summary judgment, Plaintiff argues that "the slander charge against all defendants is not time-barred as the plaintiff had included the slanderous remarks in her January 24th, 2001 performance review." (Pl.'s Mem. Opp'n Mot. Sum. J. at 8.) By (continued...)

failed to demonstrate a supportable slander claim against any of the individual defendants. As this is the only claim remaining against those defendants, the court will grant Leineweber, Escolas, Stebbins, and Shank's motion for summary judgment.

C. Plaintiff's Motion to Modify the Court's August Fourteenth Order

On June 4, 2003, this court dismissed Plaintiff's Title VII and ADA claims as time barred. Arbia v. Owens-Illinois, Inc., No. 1:02CV00111, 2003 WL 212973300, at *3-4 (M.D.N.C. June 4, 2003). Plaintiff alleged that she received her right-to-sue letter from the Equal Employment Opportunity Commission on September 6, 2001. Plaintiff then had 90 days, until December 5, 2001, to file her complaint. See 42 U.S.C. § 2000e-5(f)(1). Rather than file a complaint, on December 4, 2001, Plaintiff obtained an extension of time from an assistant clerk of the Richmond County Superior Court. In accord with North Carolina procedural rules, summonses were issued for Defendants on

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[5](...continued)
this statement, Plaintiff refers to a memorandum she authored to her supervisor, Defendant Stebbins. Plaintiff's own reiteration of slanderous comments do not, however, extend the statute of limitations. See Pressley v. Continental Can Co., 39 N.C. App. 467, 469, 250 S.E.2d 676, 678 (1979) (holding that republication of libel, procured or invited by the plaintiff, was not actionable defamation and did not toll one-year statute of limitations). Furthermore, Plaintiff's memorandum is dated January 24, 2000, not January 24, 2001. (Pl.'s Mem. Opp'n Mot. Summ. J. Ex. H.) Even if Plaintiff's own republication of the alleged slander could toll her filing deadline, it appears from her own evidence that she did so more than one year before she filed her complaint.

December 4, and Plaintiff was given 20 days, until December 24, to file her complaint. See N.C. Gen. Stat. § 1A-1, Rule 3(a). Despite this express deadline, which was clearly set forth on the order granting an extension of time, Plaintiff did not file her complaint until December 27, 2001.

Plaintiff offered no explanation for her tardiness when she opposed Defendants' motion to dismiss. The court, finding no reason to equitably toll the time limitation, dismissed Plaintiff's Title VII and ADA claims as time barred. Arbia, 2003 WL 212973300, at *4. Only then did Plaintiff offer any reason for her lateness, filing a motion to reconsider on June 16, 2003. Therein, Plaintiff alleged that the clerk told her she did not need to submit her complaint until December 27, 2001, because the state court would be closed on December 24 for the Christmas holiday.[6] (Pl.'s Mot. Modify Mem. Op. & Order at 2.) Plaintiff failed, however, to provide any evidence in support of her allegation and, on August 14, 2003, the court denied her motion to reconsider. (Order of August 14, 2003 at 2.)

Plaintiff has subsequently filed a motion to modify the court's order of August 14, 2003. This motion is essentially a second motion to reconsider the dismissal of her Title VII and

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[6] Such advice would have been contrary to the December 24, 2001, deadline expressly set forth in the order that extended Plaintiff's time to file. (See Pl.'s Mot. Modify Order Ex. D.)

ADA claims.[7] Plaintiff argues that, since the state court was closed on December 24, 2001, for the Christmas holiday, the North Carolina Rules of Civil Procedure dictate that she had until the next business day, December 27, 2001, to file her complaint. See N.C. Gen. Stat. § 1A-1, Rule 6(a) (providing that, when computing a period of time prescribed by court order, the last day of the period should be included, unless that day is "a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not . . . a legal holiday when the courthouse is closed for transactions"). In support of this argument, Plaintiff has attached an unauthenticated memorandum, purportedly from the Administrative Office of the Courts of North Carolina, which set forth the state judiciary's holiday schedule for 2001 and included December 24 as part of the Christmas holiday.

Assuming this evidence is authentic and that pronouncements by this judicial agency accurately reflect the legal holidays

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[7] Ordinarily, the court would summarily deny Plaintiff's motion, both because the court has already reconsidered its ruling on Plaintiff's Title VII and ADA claims, and because the evidence now provided was available to Plaintiff at the time of Defendants' motion to dismiss. However, this court takes seriously its duty to be "especially solicitous of civil rights plaintiffs" and recognizes that this obligation "must be heightened when a civil rights plaintiff appears pro se." Marshburn v. Postmaster Gen. of United States, 678 F. Supp. 1182, 1184 (D. Md. 1988) (quoting Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978)). As such, the court will consider, for a third time, the viability of Plaintiffs' Title VII and ADA claims.

recognized in North Carolina, cf. N.C. Gen. Stat. § 103-4 (listing December 25 as the only date of the Christmas holiday), Plaintiff may have timely filed her Title VII and ADA claims. Further, had Plaintiff produced this evidence at the time of Defendants' motion to dismiss, the court may have allowed Plaintiff to pursue her claims despite her late filing. See Kimes v. Laboratory Corp. of Am., Inc., ___ F. Supp. 2d ___, No. 1:00CV01093, 2004 WL 831006, at *3 (M.D.N.C. April 8, 2004) (stating that pro se plaintiff's filing deadline may be tolled if "equitable considerations" exist) (citing Nguyen v. Inova Alexandria Hosp., No. 98-2215, 1999 WL 556446, at *3-4 (4th Cir. July 30, 1999)).

However, the court need not consider whether the evidence put forth would have allowed Plaintiff's Title VII and ADA claims against Owens-Illinois to survive dismissal. Had these claims survived, they would be barred by the release agreement Plaintiff signed when she resigned from Owens-Illinois. As set forth above, that agreement is binding on Plaintiff and would prevent her pursuit of the Title VII and ADA claims this court previously dismissed. Since summary judgment would have been granted on those claims due to the release agreement, Plaintiff's Motion to Modify the Court's August Fourteenth Order is moot and will be denied as to the Title VII and ADA claims against Owens-Illinois.

As to the Title VII and ADA claims against the individual Defendants, the court notes that, even if these claims were not time barred, they would still have been dismissed without discovery because neither statute permits a cause of action against supervisors. See Baird ex rel. Baird v. Rose, 192 F.3d 462, 471-72 (4th Cir. 1999); Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 180-81 (4th Cir. 1998). As such, Plaintiff's motion to modify this court's order of August 14, 2003, is also denied as moot with respect to Defendants Leineweber, Escolas, Stebbins, and Shank.

III. CONCLUSION

For the reasons set forth herein, the court will deny Plaintiff's Motion to Modify the Court's August Fourteenth Order as moot. The court will grant Defendant Owens-Illinois' and Defendant Leineweber, Escolas, Stebbins, and Shank's motions for summary judgment as to all of Plaintiff's claims. A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 4th day of June 2004.

United States District Judge